

D.P.U. 94-50

Petition of New England Telephone and Telegraph Company d/b/a
NYNEX for an Alternative Regulatory Plan for the Company's
Massachusetts intrastate telecommunications services.

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INTERLOCUTORY ORDER ON NECTA'S APPEAL OF HEARING OFFICER
RULING DENYING ITS AUGUST 3, 1994 MOTION FOR RECONSIDERATION

I. INTRODUCTION

On April 14, 1994, New England Telephone and Telegraph Company d/b/a NYNEX ("NYNEX" or "Company") filed with the Department of Public Utilities ("Department") documents described as revisions to its tariff, M.D.P.U. Mass. No. 10, for effect May 14, 1994, as part of an Alternative Regulatory Plan ("Plan") for NYNEX's Massachusetts intrastate operations. ¹ The matter was docketed as D.P.U. 94-50.

¹ The Plan proposes a new form of regulation for NYNEX to replace the Department's existing rate-of-return regulation. Instead of continuing to regulate the Company's expenses, revenues, and earnings, the Department would only regulate the Company's prices, under a "price cap" form of alternative regulation. The "price cap" mechanism would allow the Company to change prices each year based on increases in inflation, less a pre-determined productivity factor, adjusted for exogenous cost changes.

On August 3, 1994, the New England Cable Television Association, Inc. ("NECTA") requested that the Hearing Officer reconsider a Hearing Officer ruling sustaining NYNEX's objection to an unnumbered NECTA record request which sought a copy of NYNEX Corporation's ² Video Entertainment and Information Services Business Plan (Tr. 7, at 61, 87-88). On September 14, 1994, in a written ruling, the Hearing Officer denied that request. See September 14, 1994 Hearing Officer Ruling at 8. On September 16, 1994, NECTA filed this appeal of the Hearing Officer Ruling that denied its request for reconsideration.

On September 22, 1994, NYNEX filed a response to NECTA's Appeal, which incorporated comments the Company had made on August 10, 1994 in response to NECTA's request to reconsider. ³ No other parties filed comments.

Also, on September 22, 1994, the Department issued an Interlocutory Order on an Appeal of the Attorney General of the Commonwealth ("Attorney General") in which it found, inter alia, that NYNEX Corporation's Video Entertainment and Information Services Business Plan was not relevant to a material issue in this proceeding. New England Telephone and Telegraph Company

² For purposes of this Order, we refer to NYNEX's parent Company as NYNEX Corporation.

³ NYNEX's letter was late-filed; however, the Hearing Officer extended the deadline for the Company to submit comments on the matter.

d/b/a NYNEX, D.P.U. 94-50, at 24 (September 22, 1994 Interlocutory Order).

On October 5, 1994, NECTA filed a Motion to Supplement the Record for purposes of this appeal ("Motion to Supplement"). NECTA asked that the Department, in ruling on the instant Appeal, take into account NYNEX's response to NECTA Record Request No. 31, which, according to NECTA, relates to costs of NYNEX's broadband initiative. NYNEX responded that, while it does not oppose the Department's consideration of NECTA Record Response No. 31, it does object to NECTA's "erroneous mischaracterization of its content" (NYNEX Response to NECTA Motion to Supplement (October 13, 1994)). Subsequently, the Hearing Officer granted NECTA's Motion to Supplement.

II. HEARING OFFICER RULING

The Hearing Officer stated in his Ruling:

In applying the [Department's] standard of review [for reconsideration] to NECTA's Motion for Reconsideration, I find that NECTA has failed to demonstrate that reconsideration (i.e., production of the contested document) is warranted.

The additional facts raised by NECTA (in NYNEX's rate of return testimony, information and record responses, copies of NYNEX internal newsletters and publications, and from testimony at the August 18, 1994 and September 7, 1994 hearings), although arguably constituting "previously unknown or undisclosed facts," would not have caused me to render a different ruling, had these facts been made known before the ruling. Underlying my July 20th ruling was the determination that NYNEX's video programming and entertainment services business plan would not tend to prove facts of consequence to the issue of cross-subsidization between

NYNEX Corporation's potential video programming business and NYNEX's Massachusetts intrastate telephone operations, or, for that matter, any other issues material to this investigation. Nothing NECTA has shown through its "new information" alters my determination.

Therefore, I find that NECTA has not shown previously unknown or undisclosed facts that would have a significant impact on the decision already rendered. Additionally, NECTA has not argued that I failed to consider existing facts, or that my ruling was the result of mistake or inadvertence. Accordingly, NECTA's Motion for Reconsideration is denied.

Notwithstanding this ruling, I recognize that it is based upon the Company's representations that the document does not contain relevant information, not upon any actual inspection of the document. Actual inspection of the document would be preferable. Therefore, I will review the document to confirm that the Company's representations are correct. Given the highly-confidential nature of the document, this inspection will be conducted in camera.⁴ If, after reviewing the document, I conclude that it contains information relevant to issues material to this proceeding, I may determine that my ruling on the contested record request should be amended. Accordingly, NYNEX shall provide the Hearing Officers with one copy of NYNEX Corporation's video programming and entertainment services business plan by

September 14, 1994 Hearing Officer Ruling at 7-8.

On September 16, 1994, the Hearing Officer stated that his in camera inspection of the Video Information and Entertainment Services Business Plan had confirmed the Company's representations about the nature of the document (Hearing Officer

⁴ An in camera review is a private viewing of documents without spectators in a judge's chambers or in the office of an administrative agency. See Western Massachusetts Electric Company, D.P.U. 92-8C-B at 1, n.2 (1993).

Procedural Notice (September 16, 1994)).

III. POSITIONS OF THE PARTIES ⁵

A. NECTA

NECTA contends that the contested document is "clearly relevant to this proceeding" (Appeal at 2). NECTA states that the Department's refusal to require NYNEX to produce the document has prejudiced NECTA's right to cross-examine NYNEX witnesses or the witnesses of other parties "on revenue requirements and pricing issues and [to] propose modification to the NYNEX Plan" (id. at 5).

First, NECTA argues that the record in this case shows that NYNEX's broadband investment, a component of NYNEX's Plan, is "motivated" by the Company's plan to enter the video programming business (id. at 1-2, citing NECTA-Exh. 197; Tr. 19, at 71-73). The entertainment and information services business plan "may shed further light on the reasonableness" of the infrastructure investments (id. at 2).

Second, NECTA contends that the document "may have bearing upon the issue of the appropriate starting rates for the Company's Plan, since video programming "appears to have affected

⁵ For expedience, we summarize below only those arguments that are made relative to the appeal of the ruling denying reconsideration. For additional discussion of the parties' positions regarding the relevance of the contested document, we refer interested parties to the September 14, 1994 Hearing Officer Ruling (a copy of which is attached to this Order as Attachment A).

[the Company's] 1993 and 1994 operating results" (id. at 3). In addition, according to NECTA, a review of the document "is relevant, if not necessary, to" determining whether NYNEX's Plan will result in telephone ratepayer subsidization of video programming in the event the Plan contains an earnings sharing feature (id. at 2-3). Furthermore, NECTA maintains that the document may also be relevant to the issue of NYNEX's cost of capital (id. at 3, citing NECTA Motion at 4).

NECTA also contends that NYNEX Corporation's video entertainment services business plans are clearly relevant to and directly tied to its telephone service pricing proposals under investigation in this docket (id. at 4).

According to NECTA, NECTA Record Request No. 31 demonstrates that "NEIS [NYNEX Entertainment and Information Services group] directly incurs some cost associated with the NYNEX broadband initiatives" (NECTA Motion to Supplement at 1, citing NECTA-RR-31). NECTA maintains that "if the NYNEX [video programming plan] has led NYNEX to directly incur costs related to the ... broadband initiatives, NECTA should be afforded the opportunity to review the [document] and inquire about the activity which has led NEIS to incur such costs, the nature of the cost directly incurred by NEIS and whether NEIS should be allocated or assigned any other types of costs of NYNEX affiliates and Bellcore which have been charged to NET's

intrastate cost of service" (id. at 2). NECTA argues that had the Hearing Officer been aware of NECTA-RR-31 when making his ruling, he would have required the Company to produce the document for NECTA (id.).

NECTA also claims that the Hearing Officer's Ruling was "internally inconsistent" because the Hearing Officer ruled on the relevancy of the document before reviewing it (id. at 5). NECTA asserts that "it is fundamentally unfair" for NECTA not to be given an opportunity to review the document and then to argue for its relevance, since NYNEX has "linked" the business plan to material issues (id. at 6). NECTA argues that Hearing Officer's review of the document was an acknowledgement that it "could be relevant to issues material to this proceeding" and was, therefore, a reversal of his original ruling (id.). In addition, NECTA states that it is willing to waive the requirement that responses to record requests automatically become part of the record, to facilitate NECTA's review of the document (id.). If after reviewing the document NECTA believes that it contains relevant information, NECTA contends that it could then "examine witnesses on the document and argue for its admissibility" (id.).

B. NYNEX

NYNEX contends that NECTA's Appeal is "totally without merit and raises no substantive issues which have not already been adequately addressed by the Company's August 10, 1994 comments"

(NYNEX September 22, 1994 Response at 1). The Company also claims that NECTA's criticism of the in camera review of the document by the Hearing Officer is "moot" given that the Hearing Officer inspected the document on September 16, 1994 and found that it is not relevant to the case (id.).

IV. ANALYSIS AND FINDINGS

In the Department's September 22, 1994, Interlocutory Order, we found, inter alia, that NECTA's unnumbered record request seeking NYNEX Corporation's Video Entertainment and Information Services Business Plan is not relevant to a material issue in this proceeding. New England Telephone and Telegraph Company d/b/a NYNEX, D.P.U. 94-50, at 24 (September 22, 1994 Interlocutory Order). In so doing, we affirmed the Hearing Officer's Ruling that sustained NYNEX's objection to the record request, thereby excluding the Video Entertainment and Information Services Business Plan from the evidentiary record in this proceeding. Id.

NECTA filed comments in support of the Attorney General's appeal, and those comments were taken into consideration by the Department in ruling on the Attorney General's Appeal. Id. at 9-10, 15-24. NECTA makes no new arguments in this Appeal, nor raises any new information that the Department was not aware of in ruling on the Attorney General's Appeal (see e.g., information raised in NECTA's August 22, 1994 Supplement to its Motion for

Reconsideration, and its September 9, 1994 Motion (September 14, 1994 Hearing Officer Ruling, at 2, 3-4, 8)) in support of its claim that the contested document is relevant to issues material to this proceeding. ⁶ Therefore, because we have already addressed this matter in our September 22, 1994 Interlocutory Order, we find that NECTA's Appeal on relevance grounds is moot.

In addition, for the reasons cited below, we find NECTA's arguments concerning the alleged procedural unfairness of the Hearing Officer's Ruling to be without merit. Contrary to NECTA's assertion, the Hearing Officer did not "reverse" his original ruling. Rather by conducting an in camera inspection of the document, he sought to ensure that the Company's representations (that the document was "strictly a marketing analysis" which would not shed light on the Company's study period earnings) were accurate. As noted supra at 4, the inspection confirmed for the Hearing Officer the correctness of the Company's representations.

NECTA also argues that it was unfair for the Hearing Officer

⁶ We note that the Hearing Officer included NECTA Record Request No. 31 as part of the record for purposes of NECTA's Appeal, which was not part of the record for purposes of the Attorney General's Appeal. See November 4, 1994 Hearing Officer grant of NECTA Motion to Supplement Record. The information contained in NECTA Record Request No. 31 is cumulative of information contained in NYNEX's Response to NECTA Information Request No. 7-41(e) and (f) (which was marked for identification as Exhibit NECTA-109), and does not include information that the Department has not already considered in ruling on the Attorney General's Appeal.

not to allow NECTA a chance to review the document and then to argue for its relevance. We disagree. Allowing NECTA to review the document before arguing for its relevance would have been tantamount to granting NECTA's request prior to, and regardless of, the Hearing Officer's disposition of the motion. See NYNEX, D.P.U. 94-50, at 23-24 (September 22, 1994 Interlocutory Order).⁷

Pursuant to the standards of G.L. c. 30A, the Department's Procedural Rules, and the specific Ground Rules governing this proceeding, the Hearing Officer was required only to allow NECTA an opportunity to present its arguments in support of the record request -- which the record clearly shows the Hearing Officer did -- not to review the document and then argue for its relevance. Nevertheless, the Hearing Officer determined that, although not required to do so, he would take the additional step of corroborating the Company's representations about the contents of the document (i.e., the document was what the Company said it was). That action was well within the Hearing Officer's

⁷ We note NECTA's offer to waive Ground Rule No. 3, which provides that responses to record requests automatically become part of the record, "unless challenged as unresponsive and expunged in whole or part." Ground Rule No. 3 (issued May 19, 1994; revised August 18, 1994). Such an offer is inherently self-serving. More importantly, to allow such a waiver would be wholly inconsistent with the nature of record requests in this proceeding. Id.; see NYNEX, D.P.U. 94-50, at 23 (September 22, 1994 Interlocutory Order) ("Record responses in this proceeding are sworn, written testimony that are part of the evidentiary record.").

properly-delegated authority, as a presiding officer in this proceeding, and arguably served as an additional protection for NECTA. See 220 C.M.R. § 1.06(6)(a).

V. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Appeal of the New England Cable Television Association, Inc., filed with the Department on September 16, 1994, be and hereby is DENIED.

By Order of the Department,

Kenneth Gordon
Chairman

Mary Clark Webster
Commissioner

NYNEX argues that NYNEX Corporation's video programming and entertainment services business plan "is not before the Department in this case nor is it reasonably related to any of the issues in this case" (NYNEX August 10, 1994 Response at 3). It contends that while parties can inquire as to whether any expenses included in the Company's 1993 operating results are associated with NYNEX's planning to enter the video programming business, such an inquiry would not be answered by the video programming business plan (id. at 3-4).

In addition, the Company disputes NECTA's claim that the contested record request would "enlighten the Department on potential cross-subsidies between the Company's potential video business and its intrastate operations," because there is no "nexus" between the record request and the issue of potential cross-subsidization (id. at 4). Moreover, the Company states that costs associated with its entertainment information services are charged to NYNEX Corporation, and are not charged to NYNEX-New England or another NYNEX affiliate (id., citing NECTA IR-7-41(e), (g); Tr. 7, at 150). ⁸ The Company also notes that (1) the Federal Communications Commission ("FCC") has established a "comprehensive system of cost allocation rules and cost accounting safeguards" to prevent misallocation of revenues, expenses and investments between regulated and unregulated services, and (2) the FCC has indicated that it will require telephone companies seeking to provide video dial tone service to maintain "subsidiary accounting records of the revenue, investments and expenses" for that service and that video dial tone interstate rates must cover the direct costs of providing the service (id., citing In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, 7 FCC Rcd. 5781, 5827-29 (1992); Application of New Jersey Bell Telephone Company, File No. W-P-C-6840, Order and Authorization released July 18, 1994, ¶¶ 42-43)).

In response to NECTA's argument that the video programming business plan is relevant to the Company's proposed deployment of a broadband network in Massachusetts, NYNEX claims that this

⁸ NYNEX contends that NECTA has exaggerated the importance of an improper allocation of approximately \$500,000 of interstate video dial tone costs in the Company's 1993 intrastate operating results (NYNEX Response at 5, n.1). According to the Company, it discovered and corrected the error, and made it known to parties and the Department (id.).

assertion is contradicted by the Company's cost/benefit analysis for broadband deployment, which suggests that the broadband network would be cost-justified without NYNEX video programming (id. at 5-6, citing MCI IR-1-16, marked for identification as Exh. AG-316; Tr. 6, at 114-115).

Finally, the Company contends that contrary to NECTA's suggestion, the proposed deployment of a broadband network in Massachusetts is not a component of the Company's Plan and does not require pre-approval by the Department, but rather was included in the Company's direct case to demonstrate NYNEX's "firm intent" to invest in the public telecommunications network under price regulation (id. at 6).

In disputing NECTA's characterization of the substance of NECTA RR-31, the Company maintains that the response does not demonstrate that "NEIS directly incurs some costs associated with the NYNEX broadband initiatives" (NYNEX October 13, 1994 letter, citing NYNEX Response to NECTA IR-7-41(e), (f); NECTA RR-31).